87-8250

Supreme Court, U.S.
FILED
NOV. 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHEL L. TILLEY, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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30(a)

QUESTION PRESENTED

Whether the Due Process clause of the Fifth Amendment is violated when representatives of the prosecuting attorney's office are permitted to nominate and recommend potential jurors to the person responsible for the convening of a court-martial?

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No.

MICHEL L. TILLEY, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Michel L. Tilley respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 21, 1987.

OPINIONS BELOW

The decision of the United States Air Force Court of Military Review was issued on December 24, 1985. *United States v. Tilley*, ACM 24722 (A.F.C.M.R. December 24, 1985). That decision is unreported, and is reproduced in the Appendix to this Petition. The decision of the United States Court of Military Appeals is reported at 25 M.J. 20 (C.M.A. 1987), and is reproduced in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h)(Supp III 1985) and 28 U.S.C. § 1259(3) (Supp III 1985). The judgment of the Court of Military Appeals was entered on September 21, 1987.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

Article 25 of the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 825 (1982), provides in pertinent part:

> (a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.
>
> * * *
>
> (c)(1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally requested in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least, one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical condition or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make

a detailed written statement, to be appended to the record, stating why they could not be obtained.

* * *

(d)(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

STATEMENT OF THE CASE

From June 12 through July 17, 1984, petitioner was tried by a general court-martial at Rhein-Main Air Base, Germany, on a charge of premeditated murder. At arraignment, he entered a plea of guilty to the lesser-included offense of involuntary manslaughter, leaving only the issue of intent and premeditation for resolution by the jury. As a result of expert testimony adduced during the course of trial, the issue of petitioner's mental responsibility was raised to such a degree that the trial judge set aside the previously entered guilty plea, and a fully litigated trial ensued.[1] The jury, composed of officer and enlisted Air Force members, found petitioner guilty of unpremeditated

[1] In military practice, when an accused wishes to plead guilty to a charge, the trial judge must conduct an inquiry of him to ensure that the plea is knowingly, voluntarily, and intelligently made. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). If during trial an accused sets up some matter which is inconsistent with the plea of guilty, then the plea must be rejected. Article 45(a), U.C.M.J., 10 U.S.C. § 845(a)(1982); *United States v. Davenport*, 9 M.J. 364 (C.M.A. 1980).

murder and sentenced him to confinement for 18 years, a dishonorable discharge, and other accessory penalties.

At trial and before making his election regarding choice of forum,[2] the defense made a motion seeking to have the panel of jurors (court members in military parlance) dismissed and a new panel selected. (R. 7). This motion had its genesis in an earlier pretrial motion to the same effect.

In March 1984, an original list of 25 prospective court members had been prepared by Captain Secours, an assistant staff judge advocate at the base legal office. This list had in turn been submitted to the special court-martial convening authority, the person responsible for making recommendations as to the disposition of petitioner's case, by Captain Sweet, the actual assistant prosecutor of petitioner's case. (App. Exhibit I). The general court-martial convening authority, Major General Goodall,[3] ultimately selected nine jurors from the original list to sit at petitioner's trial. In its pretrial motion, the defense requested that all 25 persons whose names appeared on the original list be disqualified because their names had been improperly selected by representatives of the prosecution. (App. Exhibit I).

The general court-martial convening authority assented to the request. (R. 15). A new list of 15 names was drawn[4] and forwarded to Major General Goodall, and this list did

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[2] Generally, military accuseds may elect to be tried by a military judge sitting alone, by a jury composed solely of officers, or by a jury composed of officers and at least one third enlisted members. (R. 5-7). Article 25(c)(1), U.C.M.J., 10 U.S.C. § 25(c)(1)(1982); Rule for Courts-Martial (R.C.M.) 501, 502.

[3] General Goodall was the person responsible for "convening" petitioner's court-martial.

[4] At the time of petitioner's trial, there were an estimated 300-400 officers assigned at Rhein Main Air Base who could be detailed for court-martial duty. It was from among these officers that the second list of 15 proposed jurors was drawn. (R. 22-23).

not include any names from the prior slate. (R. 9-10, 22). The officer compiling this second list, another member of the base staff judge advocate's office, knew personally or as an acquaintance each of the 15 people nominated. (R. 25). Later, but before actual selection of the court-members, it was communicated to General Goodall that two individuals from the initial list, Colonel Horton and Colonel McGovern, were still available to serve as members of the court panel that would be hearing petitioner's case. (R. 9-11; App. Exhibits I, III). Major General Goodall selected both Colonel Horton and Colonel McGovern to sit as court-members at petitioner's trial. (R. 1). The trial judge denied the resulting defense motion respecting the court member selection process (R. 32). Subsequent defense challenges for cause against both these jurors were likewise denied. (R. 37). Following these denials, petitioner elected to be tried by a jury composed of both officers and enlisted members (R. 40), but Colonels Horton and McGovern still sat as court-members.[5]

On mandatory review before the Air Force Court of Military Review, that court acknowledged the procedural anomaly in the selection of court-members but upheld appellant's conviction and sentence on the ground that any improper involvement of the convening authority or his staff judge advocate's personnel in the selection of court-members was adequately cured by the remedial action of compiling and selecting new jurors from the second venire list.

The Court of Military Appeals granted discretionary review on an unrelated instructional issue. 22 M.J. 378 (C.M.A. 1986). That court ultimately affirmed, finding no

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[5] In court-martial practice each party at trial is allowed but one peremptory challenge at trial. Article 41(b), U.C.M.J., 10 U.S.C. § 841(b) (1982). At trial the defense chose to exercise its peremptory challenge against another juror. (R. 228).

prejudice from the one error it identified. 25 M.J. 20 (C.M.A. 1987).

This Court would lack jurisdiction if the Court of Military Appeals had denied Tilley's petition for review in its entirety. 10 U.S.C. § 867(h)(1)(Supp. III 1985). While that court declined to grant review on the issue pressed in the instant Petition,[6] the legislative history of the Military Justice Act of 1983 makes it clear that this Court has jurisdiction over any *case* in which the Court of Military Appeals has granted review, even if the grant of review did not include the particular *issue* on which certiorari is sought. Section 1259 gives this Court jurisdiction over "decisions" of the Court of Military Appeals in, *inter alia,* "cases" reviewed under Article 67(b)(3) of the Code. This is in contrast with an earlier administration proposal that would have confined the certiorari jurisdiction to "issues" upon which the lower court had granted review. The House eschewed the "issues" approach, and passed a bill employing the broader "cases" phraseology in 1980. 126 Cong.Rec. H10340-42 (daily ed. Oct. 2, 1980) (H.R. 8188). That language was carried over in the measure that became the Military Justice Act of 1983. Pub. L. No. 98-209, 97 Stat. 1393. Congress's use of the broader term in the legislation ultimately enacted indicates its intention to permit review by writ of certiorari over any issue raised in the Court of Military Appeals, provided that court granted review on *some* issue in the case. Accordingly, the issue presented in the Petition is properly before the Court.

REASONS FOR GRANTING THE WRIT

The Constitution requires trial by jury in federal criminal cases. *See*, Art. III, § 2; U.S.Const. Amend. VI. This requirement has been construed to call for juries

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[6] Denial of review has no precedential value. *United States v. Mahan,* 1 M.J. 303, 307 n.9. (C.M.A. 1976).

comprised of a representative cross-section of persons from within a given community. *See, e.g., Duren v. Missouri,* 439 U.S. 357 (1979); *Taylor v. Louisiana,* 419 U.S. 522 (1975). However, courts-martial have not been considered subject to the jury trial demands of the Constitution. *Cf., Ex Parte Milligan,* 71 U.S. (4 Wall) 2 (1866); *Ex Parte Quirin,* 317 U.S. 1 (1942). Instead, qualifications for juror service on courts-martial have been prescribed by Congress in the exercise of its power under Article I, § 8, cl. 14 of the Constitution.

The essential guarantee of the Fifth Amendment's due process clause is that the government may not imprison a person except in accordance with fair procedures. In contrast to jury composition standards, this concept has long been deemed applicable to courts-martial under the rubric of military due process. *United States v. Clay,* 1 C.M.R. 74 (C.M.A. 1951); *Cf., Middendorf v. Henry,* 425 U.S. 25, 43 (1976). Indeed, the Court of Military Appeals has recognized, in the context of court-martial composition, that "an accused has an absolute right to trial before a properly constituted court with members." *United States v. Greene,* 43 C.M.R. 72, 79 (C.M.A. 1970).

Appellate courts in the military have been sensitive to perceived as well as actual improprieties in the jury selection process. *United States v. Walters,* 16 C.M.R. 191, (C.M.A. 1954); *United States v. Sax,* 19 C.M.R. 826 (A.F.B.R. 1954). This is a case in which the appearance of impropriety is so great as to constitute a denial of due process.

Military caselaw establishes that reversible error occurs where the prosecutor makes recommendations as to which individuals should comprise the jury panel of a court-martial. *United States v. Beard,* 15 M.J. 768 (A.F.C.M.R. 1983); *See also, United States v. Cherry,* 14 M.J. 251, 252-253 (C.M.A. 1982); *United States v. Crumb,* 10 M.J. 520, 527-528 (A.C.M.R. 1980). The same has been the

case in the federal sector for many years. *See, e.g., United States v. Murphy,* 224 F. 554 (N.D. N.Y. 1915); Cf., 28 U.S.C. § 1861-1869 (1982). Even where the person making the recommendation is not actually the prosecutor, but merely another attorney from the staff judge advocate's office, that person's role with respect to pretrial matters has prosecutorial aspects. *Cf. United States v. Hardin,* 7 M.J. 399, 404 (C.M.A. 1979).

To permit members of, in effect, the local district attorney's office, to nominate jury members, who are then actually appointed to serve, is unseemly. To do so for the trial of a case in which an actual prosecutor, as a representative of that office, has a personal, partisan interest in the outcome of the trial violates the intent of the Uniform Code and offends established notions of due process. *See, United States v. Clay, supra; United States v. Cook,* 18 C.M.R. 715, 717 (A.F.B.R. 1954). Any good in the initial decision to strike the original list of 25 members was lost by the subsequent decision to include the names of the two senior officers from the original, tainted list of prospective members. This error was then compounded by the action of the assistant staff judge advocate who put together the second venire list by winnowing over 300 officer names down to a total of 15, all of whom he knew at least casually. As the court reasoned in *United States v. Murphy, supra,* 224 F. at 564:

> . . . [B]ehind and underlying all is the general principle, universally recognized, that the courts cannot justly or safely permit or sanction any participation by unauthorized persons, or by parties litigant, or their representatives, in the selection of names of persons to go on the jury lists, or in the jury boxes, from which panels for service are to be drawn, no matter how high-minded and conscientious the purpose of the party so participating, and no matter that his motive is purely to promote fair trials and just verdicts and

> the due administration of the law. . . . The only safe rule is to prohibit and condemn it absolutely.

After initial good faith efforts to cure a recognized impropriety in the jury selection process, the authorities needlessly injected an appearance of evil into the procedure that could and should have been avoided. Notwithstanding recognized differences between military and civilian criminal codes and procedures, *Parker v. Levy*, 417 U.S. 733, 749-51 (1974), there is no place for the use of partisan government representatives in the sensitive area of the selection of court-members. This Court should not put its imprimatur on patently unfair practices such as these by allowing them to go unremedied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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NOVEMBER 1987

APPENDICES

BEST AVAILABLE COPY

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 54617.
ACM 24722.

UNITED STATES, APPELLEE

v.

MICHEL L. TILLEY, STAFF SERGEANT,
U.S. AIR FORCE, APPELLANT

Sept. 21, 1987.

OPINION OF THE COURT

SULLIVAN, Judge:

A general court-martial at Rhein-Main Air Base, Federal Republic of Germany, found appellant guilty of unpremeditated murder, in violation of Article 118(2), Uniform Code of Military Justice, 10 U.S.C. § 918(2). On July 17, 1984, the officer and enlisted members of this court-martial sentenced him to a dishonorable discharge, confinement for 18 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved these results, and the Court of Military Review affirmed in an unpublished opinion.

This Court granted review of the following issue raised by the defense;

> WHETHER THE MILITARY JUDGE ERRED BY FAILING TO GIVE THE DEFENSE-REQUESTED INSTRUCTIONS REGARDING THE COMBINA-

TION OF MENTAL CONDITION AND VOLUNTARY INTOXICATION.

Our review of the record reveals that the substance of the requested instructions was given by the military judge. Accordingly, we reject the asserted premise of the granted issue and affirm.

The record shows that appellant's girlfriend (TH) was beaten for over an hour by appellant, and she died on February 9, 1984. The Government charged appellant with premeditated murder under Article 118(1). The defense maintained that appellant was not capable of forming a specific intent to kill or cause great bodily harm to the victim as may be required for conviction under Articles 118(1) and 118(2). As noted above, the members found appellant guilty of unpremeditated murder under Article 118(2).

Appellant, before this Court, notes that evidence was presented at trial that at the time of the charged offense he was intoxicated; that he was an alcoholic; and that he had an adjustment disorder based on stress. On this basis, he asserts that he was entitled to an instruction that would advise the members that such conditions, if found to exist, might justify a finding that he lacked substantial capacity to form a specific intent to kill or inflict great bodily harm as required by Article 118(2). *See generally United States v. Thomson,* 3 M.J. 271, 273 (C.M.A.1977); para. 216*h*, Manual for Courts-Martial, United States 1969 (Revised edition). Although the particular instruction requested by the defense was not given,* we find no error in the present case.

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* The four doctors who testified in this case (two for each side) all stated that these conditions did not interfere with appellant's capacity to form an intent to inflict great bodily harm. Although the members were not required to accept these expert opinions, we have great doubt

The Government argues before this Court that the instructions requested by the defense were fairly encompassed in the instructions actually given by the judge. We agree. *Cf. Cabana v. Bullock,* 474 U.S. 376, 106 S.Ct. 689, 695, 88 L.Ed.2d 704 (1986); *Francis v. Franklin,* 471 U.S. 307, 315-16, 105 S.Ct. 1965, 1972, 85 L.Ed.2d 344 (1985).

Turning to the record, we first note the instruction requested by the defense. It stated:

> You are advised that the combination of voluntary intoxication and a mental condition may cause the accused to lack substantial capacity to form a premeditated design to kill, a specific intent to kill, or a specific intent to inflict great bodily harm.

The military judge expressed some doubt whether this instruction was authorized as a matter of military law. Nevertheless, he stated that such an instruction was fairly implied in his other instructions. He said: Counsel, I think we've gone over this at some point before, and I have given this a great deal of thought. I gave it great thought when I wrote the instructions. And when I say-state "voluntary intoxication by itself is not a defense to unpremeditated murder, and voluntary intoxication standing alone will not reduce unpremeditated murder to a lesser degree of unlawful killing," I don't know of any other way to say that. If it is not standing alone, then certainly you're free to make that argument to the fact-finders. But – so I'm not going to give the instruction you suggested.

The military judge's actual instructions could be reasonably interpreted by the members to convey the im-

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whether the guilty findings would change even if they were particularly instructed as requested by the defense. *See generally Rose v. Clark,* ___ U.S. ___, 106 S.Ct. 3101, 92 L.ED.2d 460 (1986).

port of the defense request. The instruction referred to stated:

> This instruction on voluntary intoxication is to be distinguished from the previous instruction concerning partial mental responsibility. As you recall, I advised you that if an accused lacked substantial mental capacity to entertain premeditation in the case of the offense charged, or a specific intent to kill or inflict great bodily harm in the case of unpremeditated murder or voluntary manslaughter, he cannot be convicted of those offenses. *You are advised, however, that as to the issue of voluntary intoxication, although the accused must have had the intent to kill or inflict great bodily harm in the lesser included offense of unpremeditated murder, voluntary intoxication by itself is not a defense to unpremeditated murder, and voluntary intoxication standing alone will not reduce unpremeditated murder to a lesser degree of unlawful killing.*

(Emphasis added.) Moreover, immediately thereafter, the military judge more clearly communicated the same idea and eliminated any doubt on this point:

> Further, regarding amnesia, you are advised that amnesia whether it results from the use of alcohol, from stress, or other emotional or psychological causes, is not a defense to a crime. *However, as with the issue of intoxication, amnesia, if genuine, is one of the factors you may consider in determining the accused's mental processes at the time of the offense and his ability to premeditate or form a specific intent to kill or inflict great bodily harm.*

Another question which is raised in this unpremeditated-murder case is whether evidence of voluntary intoxication should ever be considered on the question of one's capacity to form the intent to kill or inflict great

bodily harm. *See* 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 4.10(a) (1986); *cf.* 2 *Substantive Criminal Law* § 711(d). The Government, relying on older decisions of this Court, asserts that voluntary intoxication, as a matter of law, cannot reduce unpremeditated murder to manslaughter. *See United States v. Ferguson,* 17 U.S.C.M.A. 38 C.M.R. 239 (1968); *United States v. Craig,* 2 U.S.C.M.A. 650, 10 C.M.R. 148 (1953); *United States v. Roman,* 1 U.S.C.M.A. 244, 2 C.M.R. 150 (1952). *See also* para. 197, Manual, *supra.* Accordingly, it concludes that evidence of voluntary intoxication is legally irrelevant in all cases of unpremeditated murder. Mil.R.Evid. 402, Manual, *supra.* The defense, relying on *United States v. Thomson, supra,* and *United States v. Vaughn,* 23 U.S.C.M.A. 343, 49 C.M.R. 747 (1975) suggests that the older decisions are no longer good law or are inapplicabie to cases where evidence of voluntary intoxication does not stand alone.

We note that the *Vaughn* decision clearly holds that the intent to kill or commit great bodily harm required by Article 118(2) is a specific intent and, accordingly, the primary rationale of *Ferguson, Craig,* and *Roman* has been eroded. On the other hand, that decision cites *Ferguson* without expressly repudiating its holding. *United States v. Vaughn,* 23 U.S.C.M.A. at 345, 49 C.M.R. at 749. Moreover, a related rationale expressed in *United States v. Roman,* 1 U.S.C.M.A. at 251, 2 C.M.R. at 157, and *United States v. Ferguson,* 17 U.S.C.M.A. at 443, 38 C.M.R. at 241, that the intent to drink may suffice for malice aforethought or other intent necessary for unpremeditated murder has not yet been rejected. *See United States v. Hernandez,* 20 U.S.C.M.A. 219, 223, 43 C.M.R. 59, 63 (1970). The prudent action of the judge in giving his instructions in the present case makes it unnecessary to resolve this question today. *See* Part IV, para. 43*c* (2)(c)

and (c)(3)(c), Manual for Courts-Martial, United States, 1984.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge EVERETT and Judge COX concur.

APPENDIX B

ORDERS GRANTING PETITION FOR REVIEW

No. 54617/AF. U.S. v. Michel L. Tilley. CMR 24722. Granted on Issue IV raised by appellate defense counsel as follows:

> Whether the military judge erred by failing to give the defense requested instructions regarding the combination of mental condition and voluntary intoxication.

APPENDIX C

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 24722

UNITED STATES

v.

STAFF SERGEANT MICHEL L. TILLEY, FR 460-80-0502
UNITED STATES AIR FORCE

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24 DECEMBER 1985

Sentence adjudged 17 July 1984 by GCM convened at Rhein-Main Air Base, Germany. Military Judge: James Z. Howey.

Approved sentence: Dishonorable discharge, confinement for eighteen (18) years, forfeiture of all pay and allowances, and reduction to airman basic.

Before

SESSOMS, CANELLOS and CARPARELLI
Appellate Military Judges

DECISION

PER CURIAM:

The accused, a 33 year old Staff Sergeant, was tried by general court-martial for the murder of Telma Haering, a native of Mozambique. The convening authority chose to refer the one charge of premeditated murder as non-capital.

At arraignment, the accused entered a plea of guilty to the lesser-included offense of involuntary manslaughter, leaving only the issues of intent and premeditation for the court members to decide. During the course of the trial, defense counsel adduced expert testimony which, in the opinion of the military judge, so raised the issue of mental responsibillity that he set aside the guilty plea. The trial judge properly informed the members of the full impact of the action he had taken and thereafter instructed on all of the elements of the offense charged and all lesser included offenses raised by the evidence. The court, composed of officers and enlisted members, found the accused guilty of unpremeditated murder and sentenced him to 18 years confinement and other accessory penalties. Appellate defense counsel have assigned seven errors, only one of which we believe to be sufficiently meritorious to warrant comment.

Prior to making his election regarding the forum in which he wished to be tried, the accused made a motion for appropriate relief in which he sought to have the panel of court members dismissed and a new panel selected. In order to properly understand the defense contention, some recitation of the facts is necessary.

It appears that the officer appointed to be assistant trial counsel in this case had, in her capacity as chief of military justice, sent to the special court-martial convening authority, a list of 25 names of potential court members. This list was subsequently forwarded to the general court-

martial convening authority and it was from this list that the original nine panel members were selected. Defense filed a pretrial motion requesting that all 25 persons whose names appeared on this original list be disqualifed because their names had been selected by the assistant trial counsel. Although the assistant trial counsel's total involvement in the member selection process was limited to the ministerial act of signing her name to the letter forwarding the list to the special court-martial convening authority, the general court-martial convening authority decided to eliminate any possible taint by obtaining new nominations for court members and by selecting a new panel to hear the case.

A new list of names was forwarded from the special court-martial convening authority to the general court-martial convening authority by letter of 30 May 1984. By separate letter of the same date an assistant staff judge advocate from the base advised the general court-martial staff judge advocate that there were three persons from the original list who were still available to serve. The record contains no further explanation of how or why the three officers remained available. It does, however, reflect that they had not been chosen to be members of the original panel. According to a memorandum from the 17th Air Force Staff Judge Advocate to the general court-martial convening authority, the name of one of the officers referred to in that letter, Colonel Larry E. McGovern, had been obtained earlier from a source other than the letter or the original list of proposed members. In addition, the general court-martial convening authority, added the name of Colonel Charles E. Horton Jr. to the list from which the second panel was to be chosen. The second panel of court members selected by the general court-martial convening authority included the names of Colonels Harton and McGovern. Both had been on the

original list of nominees but neither were selected for the original panel of court members.

In another motion for appropriate relief the accused sought a new panel and a new court selection because Colonels Horton and McGovern were members of the second panel, the defense contention being that every person whose name appeared on the original list was disqualified from further participation because of the action of the assistant trial counsel in forwarding the original list. When this motion was denied by the trial judge the accused chose trial by a court composed of at least one-third enlisted members. Colonels McGovern and Horton were included in the new composition of the court. The trial judge denied challenges for cause against each of them.[1]

Defense contends that because of their involvement in the decision to provide a new panel of court members, the convening authority and his staff judge advocate are precluded from reviewing and taking action on the case because they would be reviewing their own decisions. In support of this contention they cite *United States v. Engle,* 1 M.J. 387 (C.M.A. 1976; *United States v. Hollingsworth,* 9 M.J. 839 (A.F.C.M.R. 1980); *United States v. Bowie,* 9 M.J. 680 (A.F.C.M.R. 1980); *United States v. Mounsey,* 10 M.J. 851 (N.C.M.R. 1981); and *United States v. Hill,* 7 M.J. 533 (A.C.M.R. 1979). They also refer to *United States v. Collins,* 6 M.J. 265 (C.M.A. 1979).

The essence of those cases was the appellate court's finding that the staff judge advocate was so actively and extensively involved in the trial or in preparation for the trial that he could not reasonably be called upon or expected to render an impartial post-trial review of his own earlier

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[1] We note that defense counsel did very little probing of Colonels Horton and McGovern on voir dire examination to test these officers for the existence of bias, prejudice, or predisposition.

actions. In *Engle* the staff judge advocate had prepared the pretrial advice for the convening authority. Defense counsel moved for a new advice in that case on the ground that the advice submitted to the convening authority for his disposition decision contained "a material misstatement of the evidence and omitted mention of other matters that could have affected the judgment of the convening authority." The court in *Engle* held that the staff judge advocate should have recused himself from participating in the post trial review, not merely because he had prepared the pretrial advice, but because this particular staff judge advocate "necessarily had to deal, not just with his previous legal opinions, but with the factual sufficiency of his earlier work." In *Hill, supra,* the court concluded that the staff judge advocate could not conduct the supervisory review of a case in which he had been the trial counsel.

Should the staff judge advocate not be disqualified by the proscriptions of Article 6, U.C.M.J., then the standard to be applied is whether the conduct of the staff judge advocate is "so antithetical to the integrity of the military justice system as to disqualify him from participation." *United States v. Engle, supra.*

We find that the remedial action recommended by the staff judge advocate and taken by the convening authority which was later reviewed by the military judge at trial was not conduct which was so "antithetical to the military justice system as to disqualify him from further participation." *Engle, supra* at 389. We, therefore, find a new review and action to be unnecessary.

We have resolved the remaining assignments of error adversely to the accused and therefore the finding of guilty and the sentence are

AFFIRMED.

OFFICIAL

/s/ CHARLES L. WILLE

Charles L. Willie
Captain, USAF
Chief Commissioner

U.S. GOVERNMENT PRINTING OFFICE: 1987—196-769/62015

Supreme Court, U.S.
FILED
JAN 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-825

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHEL L. TILLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner claims that his court-martial panel was improperly selected.

1. Following a general court-martial at the Rhein-Main Air Base in West Germany, petitioner, an enlisted member of the United States Air Force, was convicted of unpremeditated murder, in violation of Article 118(2) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918(2). He was sentenced to 18 years' confinement, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the findings and sentence. The Air Force Court of Military Review (Pet. App. 8a-13a) and the Court of Military Appeals (Pet. App. 1a-6a; 25 M.J. 20) affirmed.

Article 25(d)(2) of the UCMJ, 10 U.S.C. 825(d)(2), establishes the procedure for the selection of court-martial panel members. It directs the court-martial convening authority to select "such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service,

and judicial temperament."[1] Before the court-martial panel is assembled, the convening authority is free to add, delete, or substitute panel members. Arts. 25, and 29, UCMJ, 10 U.S.C. (& Supp. IV) 825, and 829.

In this case, an assistant staff judge advocate at the Rhein-Main Air Base, Captain Secours, prepared a list of 25 potential court-martial panel members (AX 1).[2] Captain Secours had participated at a pretrial hearing on the issue whether petitioner should be confined pending trial. That list was forwarded by a letter dated March 19, 1984, to the special court-martial convening authority over the signature of Captain Sweet, who served as an assistant prosecutor in petitioner's case (*ibid.*). Captain Sweet's only involvement in the process of selecting the names of the potential court-martial members was the ministerial act of signing the letter (R. 12). The special court-martial convening authority in turn forwarded the 25 names to the general court-martial convening authority by a letter dated March 19, 1984. The general court-martial convening authority thereafter selected nine panel members from that list. Pet. App. 9a-10a.

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[1] A "convening authority" is a commander who is authorized to convene a court-martial pursuant to Articles 22-24 of the UCMJ, 10 U.S.C. (& Supp. IV) 822-824, and Rule for Courts-Martial 504, *Manual for Courts-Martial, United States—1984 (Manual).* The duties of the convening authority include the selection and appointment of court-martial panel members (a practice commonly known as "detailing" members of a court-martial), directing that the defendant be tried by the court-martial for the charged offense (a practice commonly known as the "referral" of charges to a court-martial), and conducting a post-trial review of the proceedings. See Arts. 25, 34, and 60, UCMJ, 10 U.S.C. (& Supp. IV) 825, 834, and 860; see also Rules 503, 601, and 1107, *Manual.*

[2] The commander at Rhein-Main exercises special court-martial jurisdiction. General court-martial jurisdiction is exercised by the commander of the 17th Air Force at Sembach Air Force Base in West Germany.

In a pre-trial motion, petitioner challenged the prosecutors' participation in the process of recommending court-martial panel members and sought the appointment of a new panel (AX 1). In order to avoid any appearance of impropriety, the convening authority granted petitioner's motion and directed the staff judge advocate to prepare a new list from which the convening authority could select another panel (Pet. App. 10a). The staff judge advocate directed Captain Parkhill, who had no prior involvement in petitioner's case, to prepare the new list (*ibid.*; R. 17).

Captain Parkhill then obtained a list of the officers who were assigned to the base. From that list, Captain Parkhill deleted the names of the officers who would be unavailable to serve at trial, those who had some knowledge of the case, and those who had been on the first list. That process resulted in a second list of 15 recommended officers (R. 18, 21, 24-25).[3] After having background data sheets completed on those 15 officers, Captain Parkhill forwarded their names and the background information to the special court-martial convening authority. The special court-martial convening authority, in turn, forwarded the list to the general court-martial convening authority along with his recommendations as to which members should be selected (AX 3).

Captain Parkhill subsequently determined that three officers from the original list of 25 were also available to

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[3] Petitioner complains (Pet. 5) that Captain Parkhill had at least a casual knowledge of the 15 persons he recommended to the convening authority. That is hardly surprising, however, since there are only some 300-400 officers assigned to the base and since Captain Parkhill had served there for three years (R. 22, 25). In any event, Captain Parkhill was in the process of recommending members having the qualifications prescribed by Article 25(d)(2) of the UCMJ, and he could not make appropriate recommendations without some knowledge about the persons he listed.

serve on the court-martial panel (R. 20). He forwarded those three names to the staff judge advocate of the general court-martial convening authority by a letter dated May 30, 1984. Colonel McGovern, one of the three officers named in Captain Parkhill's letter, was among the officers selected by the convening authority for petitioner's court-martial panel. The convening authority, however, obtained Colonel McGovern's name from another source, not from Captain Parkhill's letter. Colonel Horton, a second officer whose name had been on the first list, was also chosen for the court-martial panel assigned to petitioner's case. Colonel Horton's name had not been listed in Captain Parkhill's letter and thus, like Colonel McGovern's name, was obtained from another source. See AX 2, at 8; AX 4, at 10.

At trial, petitioner contended that the presence of Colonels Horton and McGovern on his court-martial panel gave rise to an appearance of impropriety. Petitioner also challenged them for cause based on the allegedly defective selection procedure. The trial judge found no appearance of impropriety and denied petitioner's for-cause challenge (R. 31, 37).

2. Petitioner's claim is quite narrow. He does not contend that the court-martial panel selection process adopted by Congress and authorized by Article 25(d)(2), 10 U.S.C. 825(d)(2), is unconstitutional. Nor does he claim that either Colonel Horton or Colonel McGovern was biased in any way. Instead, petitioner argues that their presence on his court-martial panel gave rise to an appearance of impropriety because they were named on the original list of recommended panel members that was forwarded to the convening authority over the assistant prosecutor's signature. That fact-bound claim does not warrant review by this Court.

Even if there was some flaw in the original selection process,[4] it was cured by the process used to select the second panel—the one that actually heard petitioner's case. That panel was not selected from the list prepared by the assistant prosecutor. Rather, it was selected from the new list prepared by an assistant staff judge advocate who was not involved in the prosecution and from other sources considered by the convening authority. That fact that two officers who had been on the original list of proposed panel members were also on the second list of proposed panel members did not taint the process that was used to obtain that list, since the convening authority was free to select names from any source and was not in any way dependent upon, or directed by, the contents of the first list. Although the convening authority selected the names of two officers who had been on that list, the convening authority did not choose them from that list or from Captain Parkhill's letter. Thus, even on petitioner's assump-

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[4] Prior military decisions have emphasized the distinction between purely ministerial actions performed by a prosecutor during the court-martial panel selection process and a more substantive involvement in recommending the selection of panel members. Only the latter, the military courts have held, invalidates the selection process. Compare *United States* v. *Sax*, 19 C.M.R. 826, 836-838 (A.F.B.R. 1954) (trial counsel's signature on letter recommending court members so it could be sent to convening authority did not invalidate selection process), with *United States* v. *Cook*, 18 C.M.R. 715 (A.F.B.R. 1954) (selection of court-martial panel members by prosecutor held invalid). The prosecuting attorney's involvement in the selection process was purely ministerial; it consisted simply of forwarding over her signature a letter containing a list of recommended panel members. The list was prepared by someone else, an assistant staff judge advocate whose only involvement in the case was at a pretrial confinement hearing. It is not clear whether petitioner challenges that attorney's participation in the process of selecting the court-martial members. In any event, for the reasons given in the text, that attorney's participation was ultimately rendered immaterial once the new list was prepared for the convening authority by Captain Parkhill.

tion that the first list was somehow tainted, the convening authority's process of selecting court-martial members was not in any way affected by the method by which that list was compiled.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1988

[5] Petitioner suggests in passing (Pet. 8) that there is something more generally amiss about permitting staff judge advocates to select the list of proposed court-martial members, even when the assistant staff judge advocate who composes the list is not involved in the prosecution. Petitioner, however, did not make that argument to the trial court and thus has waived it.

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